COPY

Office - Supreme Court
FILED
APR 7 195
HAROLD B. WILLEY,

No. 705

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

WINNIE COLBERT, now BRIANS,
*Petitioner,*

VERSUS

C. W. ROODHOUSE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

JAMES W. BOUNDS,
Hugo, Oklahoma,
*Counsel for Petitioner.*

*Of Counsel:*

HAL WELCH,
Hugo, Oklahoma;

CARLOSS WADLINGTON,
Ada, Oklahoma.

April, 1955.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 2-5750

BLEED THROUGH POOR COPY

# INDEX


PAGE

(a) Reports of Opinions Delivered Below ..... 1

(b) Grounds on Which Jurisdiction of This Court is Invoked ..... 2

(c) The Questions Presented for Review ..... 6

(d) Statutes Involved ..... 7

(e) Statement of the Case ..... 17

Argument ..... 27

First Proposition: The Supreme Court of Oklahoma erred in holding that the land involved herein became taxable in 1930, or at any time prior to April 26, 1931, and in so holding the Supreme Court of Oklahoma overlooked the specific tax exemption in Section 19 of Act of Congress of April 26, 1906, 34 Stat. 144, and such decision of the Supreme Court of Oklahoma is in conflict with decisions of this Court in Board of Commissioners of Creek County v. Seber, 318 U.S. 705, and Oklahoma Tax Commission v. United States, 319 U.S. 598 ..... 27

Second Proposition: The Supreme Court of Oklahoma erred in holding that the land involved was taxable for the years 1939, 1940, and 1942, and at any time prior to two years after the Act of Congress of August 4, 1947, 61 Stat. 732 ..... 32

Third Proposition: The Opinion of the Supreme Court of Oklahoma is in error in construing Section 6(b) of the Act of Congress of August 4, 1947, as making the land herein involved tax-

INDEX CONTINUED PAGE

able for the years 1939, 1940, and 1942, or as preventing plaintiff from contending that it was not taxable for those years ..... 35

Fourth Proposition: The Supreme Court of Oklahoma erred in not holding that the resale tax deed issued to defendant was void and in not holding that the five years statute of limitation does not apply for the reason that the land was not "sold for taxes" within the meaning of Section 93, Title 12, O.S., 1951 ..... 37

Fifth Proposition: The 1949 Amendment to the Oklahoma Statute of Limitation was not put in force as against plaintiff as to the land involved by Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239 ..... 38

Reasons Relied Upon for Allowance of Writ of Certiorari ..... 39

Conclusion ..... 40

Appendix:

(Exhibit A)—Journal Entry—District Court of Pontotoc County ..... i

(Exhibit B)—Opinion, Supreme Court of the State of Oklahoma ..... iii

(Exhibit C)—Opinion (specially concurring in part and dissenting in part) ..... xi

(Exhibit D)—Order, Denying Petition for Rehearing ..... xix

(Exhibit E)—Orders Denying Application to File Second Petition for Rehearing and Oral Argument ..... xx

BLEED THROUGH POOR COPY

INDEX CONTINUED PAGE

## CITATIONS

CASES:

Bailey v. Banister (10th Cir.), 200 P.2d 683 ..... 26
Board of Commissioners of Creek County v. Seber, 318 U.S. 705 ..... 30, 31, 36
Board of Com'rs of Jackson County, Kansas, v. United States, 308 U.S. 343 ..... 39
Board of Com'rs of Marshall County v. U. S., 152 F.2d 540 ..... 32, 33, 34, 36
Bridges v. Stick (D.C., E.D., Okla.), 106 F. Supp. 506 ..... 32, 35, 36

Choate v. Trapp, 224 U.S. 665 ..... 7, 31
Coker v. Watson, 123 Okla. 199, 252 Pac. 829 ..... 26, 31
Combs v. Johnson, 92 Okla. 189, 218 Pac. 1098 ..... 32

Gypsy Oil Co. v. Escoe, 275 U.S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112 ..... 5

Hutchison v. Brown, 66 Okla. 250, 167 Pac. 624 ..... 37

Johnson v. Jackson, 156 Okla. 148, 9 P.2d 950 ..... 32

Kelly v. Watkins, 105 Okla. 116, 231 Pac. 873 ..... 26

Marcy v. Board of Com'rs of Seminole County, 45 Okla. 1, 144 Pac. 611 ..... 32
McGeisey v. Board of Com'rs of Seminole County, 45 Okla. 10, 144 Pac. 614 ..... 32
Morse v. United States, 270 U.S. 151, 70 L. Ed. 518, 46 Sup. Ct. 241 ..... 5
Morton v. Van Orsdol, 203 Okla. 394, 222 P.2d 520 ..... 38

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 82 L. Ed. 1381, 58 Sup. Ct. 904 ..... 5

Oklahoma Tax Commission v. United States, 319 U.S. 598 ..... 28, 31

INDEX CONTINUED

PAGE

Parker v. Richard, 250 U.S. 233 ..... 31
Patterson v. Carter, 83 Okla. 70, 200 Pac. 855 ..... 39
Powell v. City of Ada, 61 F.2d 283 ..... 26, 31, 32

Southwest Coal & Improvement Co. v. McBride, 185 U.S. 499 ..... 36
Squires v. Swanson, 169 Okla. 390, 37 P.2d 276 ..... 32

Taylor v. Miles, 5 Kan. 498, 7 Am. Rep. 558 ..... 37
Tobley v. Dekinder, 110 Okla. 63, 237 Pac. 67 ..... 39

U. S. ex rel Sykes v. Lane, Secretary of the Interior (Court of Appeals, D. C.), 258 Fed. 520 ..... 26
U. S. v. Bean, 253 Fed. 1 ..... 32
United States v. Board of Com'rs of McIntosh County, 154 F.2d 600 ..... 32, 33
United States v. Hester, 137 F.2d 145 ..... 33
U. S. v. Oklahoma Tax Commission, 131 F.2d 635, 636 ..... 28
United States v. Rickert, 188 U.S. 432 ..... 31
United States v. Seminole Nation, 299 U.S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283 ..... 5
U. S. v. Shock (CC), 187 Fed. 870 ..... 32

Watkins v. Howard, 64 Okla. 166, 166 Pac. 706 ..... 32
Wolfe v. Phillips, 172 F.2d 481 ..... 38

Zweigel v. Webster, 32 F. Supp. 1015 ..... 31, 33, 34

STATUTES:

Act of June 28, 1898 (Curtis Act), Sec. 29, (30 Stat. 495, 507) ..... 7
Act of July 1, 1902, Sec. 11 (32 Stat. 641) ..... 9-10
Act of July 1, 1902, Sec. 12 (32 Stat. 641) ..... 8, 9-10
Act of April 26, 1906, Sec. 2 (34 Stat. 137) ..... 8
Act of April 26, 1906, Sec. 19 (34 Stat. 137) ..... 8, 10, 20, 28, 29, 31
Act of June 16, 1906, Sec. 1 (34 Stat. 267) ..... 16

BLEED THROUGH POOR COPY

INDEX CONTINUED

PAGE

Act of April 26, 1906, Sec. 19 (34 Stat. 144) ..... 6
Act of May 27, 1908, Sec. 1 (35 Stat. 312) ..... 9, 31
Act of May 27, 1908, Sec. 3 (35 Stat. 312) ..... 10
Act of May 27, 1908, Sec. 4 (35 Stat. 312) ..... 10
Act of May 27, 1908, Sec. 5 (35 Stat. 312) ..... 11
Act of April 12, 1926, Sec. 2 (44 Stat. 239) ..... 13
Act of May 10, 1928, Sec. 4 (45 Stat. 495, as amended by Act of May 24, 1928, 45 Stat. 733) ..... 6
Act of May 10, 1928, Sec. 1 (45 Stat. 495) ..... 11
Act of May 10, 1928, Sec. 4 (45 Stat. 495) ..... 11-13
Act of August 4, 1947, Sec. 6(b) (61 Stat. 732) ..... 7, 13, 19, 34, 35, 36, 48

Atoka Agreement (adopted by Sec. 29 of Act of Congress of June 28, 1898, 30 Stat. 495) ..... 6, 7, 8

Laws 1923, ch. 123, p. 203, Sec. 1 ..... 15-16
Laws 1933, ch. 115, p. 243, Sec. 1 ..... 15
Laws 1949, p. 95, Sec. 1, effective April 18, 1949 (Title 12, O.S. 1951, Sec. 93) ..... 14-15

Seminole Agreement (30 Stat. 567) ..... 28-29

Title 12, O.S. 1941, Sec. 93 (as amended by Laws 1945, p. 37, Sec. 1) ..... 14
Title 12, O.S. 1941, Sec. 93 ..... 7
Title 12, O.S. 1951, Sec. 93, Subdiv. 4 ..... 38
Title 12, O.S. 1951, Sec. 987 ..... 4
Title 28, U.S.C., Sec. 2101, Subd. c ..... 3
Title 28, U.S.C., Sec. 1257 ..... 5-6
Title 68, O.S. 1941, Sec. 15.6 ..... 15

TEXTBOOKS AND MISCELLANEOUS:

Constitution of Oklahoma, Sec. 6, Art. 10 ..... 16

Mills Oklahoma Indian Land Laws, paras. 311-323 ..... 29

INDEX CONTINUED

PAGE

Rules of Supreme Court of Oklahoma:

Rule 28 ..... 3

Rule 29 ..... 3-4

Rule 33 ..... 4

BLEED THROUGH POOR COPY

# In the
# Supreme Court of the United States
OCTOBER TERM, 1954

No. .....

WINNIE COLBERT, now BRIANS,
*Petitioner,*

VERSUS

C. W. ROODHOUSE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

### (a) REPORTS OF OPINIONS DELIVERED BELOW

This petition is to obtain a review of the decision and judgment of the Supreme Court of the State of Oklahoma, rendered on November 9, 1954, in case numbered 35987 in that court, entitled Winnie Colbert, now Brians, Plaintiff in Error, v. C. W. Roodhouse, Defendant in Error, and the decision of such Supreme Court of Oklahoma, made on January 7, 1955, denying the petitioner's petition for rehearing in that court (R. 106), which petition for rehearing had been filed within the time allowed by the rules of that court (R. 68), and the order of that court made on February 1, 1953, denying the application of petitioner for leave to file a second petition for rehearing, as permitted

by the rules of that court (R. 107). The opinion of the Supreme Court of Oklahoma in such case was written by JUSTICE O'NEAL and is reported in 279 P.2d at page 349. JUSTICE WILLIAMS of that court rendered a specially concurring opinion which is reported in 279 P.2d at page 355. Said opinions appear in the typewritten certified transcript of record filed herewith (R. 45-67), and are attached to this petition as part of the appendix. On February 3, 1955, the Supreme Court of Oklahoma made an order staying the enforcement of its mandate until April 6, 1955, pending the filing of this petition in this Court (R. 108). References herein are to pages in the typewritten transcript of record.

The opinions of the Supreme Court of Oklahoma are reported in the Pacific Reporter, and there are no official state reports for such opinions being published now.

**(b) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED**

The opinion and decision of the Supreme Court of Oklahoma was rendered on November 9, 1954 (279 P.2d 349), but within 15 days thereafter, on November 24, 1954, petitioner filed in that court, as permitted by its rules, a petition for rehearing (R. 68). Such petition for rehearing with the brief filed therewith is set forth in full in the transcript filed herewith at pages 68 to 105 thereof. Such petition for rehearing was denied on January 7, 1955 (279 P.2d 349) (R. 106). It is intended that this petition be filed in this Court within 90 days after such denial of said petition for rehearing by the Supreme Court of Oklahoma. The rules of the Supreme Court of Oklahoma allow the

presentation of an application for leave to file a second petition for rehearing. Application for leave to file a second petition for rehearing was presented in due time to said Supreme Court of Oklahoma and was denied on February 1, 1955 (279 P.2d 349) (R. 107). The Supreme Court of Oklahoma made an order on February 3, 1955, staying the enforcement of its mandate until April 6, 1955 (R. 108). By Subdivision c of Section 2101, U.S.C., writ of certiorari may be applied for in this Court within 90 days after the entry of the judgment or decree of the Supreme Court of Oklahoma.

Rule 28 of the Supreme Court of Oklahoma provides:

"(1) Applications for a rehearing in any cause, unless otherwise ordered by the Court, shall be made by petition to the Court, signed by counsel, and filed with the Clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing without leave of Court. The Clerk shall not file any such motion or application except by leave of the Court first obtained. No petition for rehearing shall be filed or considered without proof of service.

"(2) Ten (10) clearly legible copies of petitions for rehearing shall be filed. If such petitions are typewritten, two original copies with four carbon copies of each original shall be filed."

Rule 29 of such rules says:

"(1) Within five (5) days after a petition for rehearing is denied an application for a second petition

for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and a brief in support thereof.

"(2) Ten (10) copies of such application, petition for rehearing, and brief are required, as provided in Rule 28(2) *supra.*"

Rule 33 of the Rules of the Supreme Court of Oklahoma, says:

"(1) After the expiration of fifteen (15) days from the filing of an opinion proper mandate to the trial court may issue; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied, the mandate shall not be issued and transmitted until the expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of.

"(2) If such application for a second petition for rehearing is denied, the mandate may issue.

"(3) All mandates shall be issued by the Clerk on order of the Chief Justice."

Such rules are published in the official Oklahoma Statutes 1951, following Section 987 of Title 12.

Petitioner believes this petition for writ of certiorari may invoke the jurisdiction of this Court if filed in the Supreme Court of the United States within 90 days after

BLEED THROUGH POOR COPY

petition for rehearing in the Supreme Court of Oklahoma was denied by the Supreme Court of Oklahoma on January 7, 1955 (R. 106), or within 90 days after application for leave to file a second petition for rehearing was denied by the Supreme Court of Oklahoma, on February 1, 1955 (R. 107), but intends for this petition for writ of certiorari to be filed within 90 days from January 7, 1955, the date the petition for rehearing was denied by the Supreme Court of Oklahoma.

—*Morse* v. *United States,* 270 U.S. 151, 70 L. Ed. 518, 46 Sup. Ct. 241;

*Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112;

*United States* v. *Seminole Nation,* 299 U.S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283;

*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 82 L. Ed. 1381, 58 Sup. Ct. 904.

The statutory provision which petitioner believes confers on this Court jurisdiction to review the judgment and decision of the Supreme Court of Oklahoma, rendered on November 9, 1954, and its judgment and decision of January 7, 1955, denying petitioner's petition for rehearing in that court, is that part of Section 1257 of Title 28, U.S.C., which provides that:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * * * *

"(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

**(e) THE QUESTIONS PRESENTED FOR REVIEW**

(1) Whether restricted allotted lands of a Chickasaw Indian in Oklahoma became taxable in 1930 or at any time prior to April 26, 1931, or upon the expiration of 21 years from the date of the patent for such lands?

(2) Whether such land was tax exempt at all times prior to April 26, 1931, by reason of the tax exemption granted as to such land by Section 19 of the Act of Congress of April 26, 1906, 34 Stat. 144, or whether the only tax exemption granted as to such land by any treaty or Act of Congress was that contained in the Atoka Agreement (adopted by Section 29 of Act of Congress of June 28, 1898, 30 Stat. 495), providing for tax exemption to all allotted lands for 21 years from date of patent?

(3) Whether such restricted allotted land of petitioner remained exempt from taxation on and after April 26, 1931, where not described in any tax exemption certificate executed pursuant to Section 4 of Act of May 10, 1928, 45 Stat. 495, as amended by Act of May 24, 1928, 45 Stat. 733, where petitioner did not own as much as 160 acres of restricted land on April 26, 1931, when Section 4 of the Act of May 10, 1928, took effect?

BLEED THROUGH POOR COPY

(4) Whether such land was taxable for the years, 1939, 1940, and 1942, or at any time prior to two years after the Act of Congress of August 4, 1947, 61 Stat. 732?

(5) Whether Section 6(b) of the Act of Congress of August 4, 1947, 61 Stat. 732, operated retroactively to make such land taxable for the years, 1939, 1940 and 1942, or prevents petitioner from contending that it was not taxable for those years?

(6) Whether if such land was not taxable for the years for which taxes were assessed, for which it was sold at tax resale in 1943, the tax deed issued to respondent pursuant to such resale is protected by an amendment to the Oklahoma Statute of Limitation (12 O.S. 1941, Sec. 93), enacted in 1949, and whether the land was "sold for taxes" within the meaning of Subdivision 3 of Section 93, Title 12, Oklahoma Statutes 1951?

(7) Whether the 1949 amendment to Oklahoma Statute of Limitation (12 O.S.A., Sec. 93) was put in force as to such land by Section 2 of Act of Congress of April 12, 1926 (44 Stat. 239)?

## (d) STATUTES INVOLVED

Part of the "Atoka Agreement", embodying a treaty agreed upon between the Commission to the Five Civilized Tribes and representatives of the Choctaw and Chickasaw Indian Nations on April 23, 1897, adopted by Congress by Act of June 28, 1898 (Curtis Act), Sec. 29, 30 Stat. 495, 507, and adopted by Tribes on August 24, 1898 (referred to in *Choate* v. *Trapp*, 224 U.S. 665), which said:

"All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, * * *."

Part of Section 19 of Act of Congress of April 26, 1906, 34 Stat. 137, which said:

"That all lands from which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Section 12 of Choctaw-Chickasaw Supplemental Agreement, adopted by Act of Congress of July 1, 1902, 32 Stat. 641, and ratified by Tribes September 25, 1902:

"Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

Part of Section 2 of Act of Congress of April 26, 1906, 34 Stat. 137:

"That for ninety days after approval hereof applications shall be received for enrollment of children, who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek Tribes, or have applications for enrollment pending at the approval hereof, * * *."

BLEED THROUGH POOR COPY

Part of Section One of Act of Congress of May 27, 1908, 35 Stat. 312:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Part of Section 11 of Choctaw-Chickasaw Supplemental Agreement, Act of Congress of July 1, 1902, 32 Stat. 641:

"There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in

value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, * * *."

Part of Section 19 of Act of Congress of April 26, 1906, 34 Stat. 137:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior:."

Part of Section 3 of Act of Congress of May 27, 1908, 35 Stat. 312:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act * * *."

Section 4 of Act of Congress of May 27, 1908, 35 Stat. 312:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, That allotted lands shall not be

BLEED THROUGH POOR COPY

subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

Section 5 of Act of May 27, 1908, 35 Stat. 312:

"That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

Section One of Act of May 10, 1928, 45 Stat. 495:

"That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years, commencing on April 26, 1931: Provided, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Section 4 of Act of May 10, 1928, 45 Stat. 495, as amended by Act of May 24, 1928, 45 Stat. 733:

"That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: Provided, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected; Provided further, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior; and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes, and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: Provided, That the tax exemption shall not extend beyond the period of restrictions provided for in this act: And provided further, That the tax-exempt land of any such Indian allottee, heir, or de-

visee shall not at any time exceed one hundred and sixty acres."

Section 6(b), Act of Congress of August 4, 1947, 61 Stat. 732:

"All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period: Provided, That any right to tax exemption which accrued prior to the date of this Act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat. 777), shall terminate unless a certificate of tax exemption has been filed of record in the County where the land is located within two years from the date of this Act."

Part of Section 2 of Act of Congress of April 12, 1926, 44 Stat. 239:

"The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State: * * *"

Prior to its amendment in 1949, Section 93 of Title 12, Okla. Stat. 1941 (as amended by Laws 1945, page 37, Sec. 1), provided, in part:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:
>
> * * * * * * * * *
>
> "(3) An action for the recovery of real property sold for taxes, within two (2) years after the date of the recording of the tax deed.
>
> "(4) An action for the recovery of real property not hereinbefore provided for, within fifteen (15) years."

This section was amended by Laws Okla. 1949, page 95, Sec. 1, effective April 18, 1949, to read in part as follows:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no other time thereafter:
>
> * * * * * * * * *
>
> "(3) An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the tax deed.
>
> "(4) An action for the recovery of real property not hereinbefore provided for, within fifteen (15) years * * *.
>
> * * * * * * * * *
>
> "(6) Numbered paragraphs 1, 2 and 3 shall be fully operative regardless of whether the deed or judgment

BLEED THROUGH POOR COPY

or the precedent action or proceeding upon which such deed or judgment is based is void or voidable in whole or in part, for any reason, jurisdictional or otherwise; provided that this paragraph shall not be applied so as to bar causes of action which have heretofore accrued, until the expiration of one (1) year from and after its effective date" (12 Okla. Stat. 1951, Sec. 93).

Subdivision 4 was not changed by the 1949 amendment.

The 1949 amendment added Subdivision 6.

The only change made in Subdivision 3 by the 1949 amendment was to change "two (2) years" to "five (5) years."

Part of Section 15.6 of Title 68, Okla. Stat. 1941:

"All property, both real and personal, having an actual, constructive or taxable situs in this State, shall except as hereinafter provided, be listed and assessed in the county, and municipal subdivision thereof, where actually located on the first day of January of each year."

Part of Okla. Laws 1933, ch. 115, page 243, Sec. 1:

"All taxable property shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owner thereof, on the first day of January of each year, including all property owned on the first day of January of that year; * * *."

Part of Okla. Laws 1923, ch. 123, page 203, Sec. 1:

"The following property shall be exempt from taxation:

* * * * * * * * *

"Such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws."

Section 1, Act of Congress of June 16, 1906, 34 Stat. 267:

"That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed."

Part of Section 6 of Article 10 of Constitution of Oklahoma:

"Property exempt from taxation—

"such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws."

## (e) STATEMENT OF THE CASE

The action was commenced in the District Court of Pontotoc County, Oklahoma, on July 18, 1952 (R. 1). Petitioner was the plaintiff and respondent the defendant. The trial court sustained the motion of the defendant for judgment on the pleadings on February 4, 1953 (R. 43), and rendered judgment for the defendant on the pleadings. Plaintiff gave notice of appeal and filed petition in error with certified transcript of the record of the District Court of Pontotoc County, Oklahoma, in the Supreme Court of the State of Oklahoma on April 25, 1953. A copy of the judgment of the District Court of Pontotoc County, Oklahoma, is attached hereto as part of the appendix and marked Exhibit "A." The Supreme Court of Oklahoma rendered a decision and opinion affirming the judgment of the District Court of Pontotoc County, Oklahoma, on November 9, 1954, and a copy of said opinion and decision is attached as a part of the appendix and marked Exhibit "B." Three Justices dissented and Justice Williams filed a specially concurring opinion and a copy of it is attached as part of the appendix and marked Exhibit "C." Petitioner filed petition for rehearing in the Supreme Court of Oklahoma on November 24, 1954 (R. 68), which was denied on January 7, 1955 (R. 106). A copy of order of Supreme Court of Oklahoma denying petition for rehearing is attached as part of the appendix and marked Exhibit "D." Thereafter petitioner presented to the Supreme Court of Oklahoma an application for leave to file second petition for rehearing and such application was denied on February 1, 1955 (R. 107). A copy of order deny-

ing such application is attached as part of the appendix and marked Exhibit "E." The Federal questions sought to be reviewed were raised at all stages of the proceedings in the state courts. Such questions are presented by the plaintiff's petition which commenced the action in the District Court of Pontotoc County, Oklahoma (R. 1). The record shows that such questions were presented to the Supreme Court of Oklahoma by the petition for rehearing filed in the time and manner provided by the rule of that court (R. 68). The petition for rehearing and brief in support thereof filed in the Supreme Court of Oklahoma is set forth in full in the record (R. 68-105).

This action was brought to recover possession of a 20-acre tract of land and for damages for loss of use and occupation thereof and to quiet title thereto in the petitioner and to set aside a resale tax deed under which defendant claims title to the land involved (R. 1-13). Plaintiff's petition was in form in two causes of action, the first cause of action being for recovery of the real estate and for damages for loss of use and occupation of the real estate for six years preceding the commencement of the action and the second cause of action was to quiet title and to set aside the resale tax deed under which the defendant claims title to the land (R. 2). The respondent (defendant) is claiming title to the land by reason of a resale tax deed which was issued to him by the County Treasurer of Pontotoc County, Oklahoma, on May 12, 1953, and was recorded in the office of the County Clerk of Pontotoc County, Oklahoma, on May 12, 1943 (R. 2). Such resale tax deed was based upon purported ad valorem taxes assessed against

BLEED THROUGH POOR COPY

the 20-acre tract of land involved for the years 1939, 1940 and 1942 (R. 2). Petitioner claims that the land was non-taxable for those years under the laws of the United States (R. 2). She is asserting rights and immunities under the statutes of the United States.

The defendant filed an answer (R. 40) in which he pleaded the 1949 five-year statute of limitation pertaining to actions for recovery of real property sold for taxes and the new Subdivision 6 of Section 93 of Title 12, Oklahoma Statute, which was embodied in the 1949 amendment to Oklahoma Statutes of Limitations, *supra*.

Motion for judgment on the pleadings filed by the defendant moved the court to render judgment for the defendant on the ground that the plaintiff's petition shows that her cause of action is barred by such 1949 amendment to the Oklahoma Statute of Limitations (R. 42). The trial court sustained such motion and rendered judgment for the defendant on pleadings and dismissed plaintiff's suit with prejudice (R. 43).

The opinion of the Supreme Court of Oklahoma assumes that if the land involved was actually non-taxable for the years 1939, 1940 and 1942, for which years' taxes it was sold at resale to the defendant in May, 1943, that the five-year statute of limitation contained in the 1949 amendment to Section 93 of Title 12, Oklahoma Statutes, would not be applicable and that the only possible applicable statute of limitation would be that set forth in Subdivision 4 of Section 93 of Title 12, Oklahoma Statute 1951, providing for a limitation period of 15 years on an action for recovery of real property not otherwise provided for

and such opinion of the Supreme Court of Oklahoma reached the conclusion that the land was actually taxable during the years 1939, 1940 and 1942, for which years' taxes it was sold at the resale in 1943, and in reaching such conclusion determined:

First: That this particular land had been subject to taxation since the expiration of 21 years from the date of the patent and had become taxable in 1930, prior to April 26, 1931, on the assumption that the only tax exemption granted by Federal law or treaty as to this land was that contained in the Atoka Agreement, *supra*, which provided that all of the lands allotted should be non-taxable while the title remained in the original allottee, not exceeding 21 years from the date of patent, and overlooked the specific tax exemption of all restricted allotted land provided for in Section 19 of the Act of Congress of April 26, 1906, *supra*, and the decision of this Court in *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, which was specifically called to the attention of the Supreme Court of Oklahoma in the petition for rehearing filed in that court (R. 68).

Second: That by reason of Section 6(b) of Act of Congress of August 4, 1947, 61 Stat. 731, plaintiff could not contend that the land was non-taxable for the years 1939, 1940 and 1942. Petitioner asserts that both of said grounds for the decision of the Supreme Court of Oklahoma as stated in the majority opinion of that court written by Justice O'Neal are completely erroneous and in conflict with controlling decisions of this Court and other decisions.

Plaintiff acquired title to the land involved herein by allotment patent (R. 1). Plaintiff is enrolled as of seven-

BLEED THROUGH POOR COPY

eighths degree of Indian blood, opposite Roll No. 52 of the final approved roll of minor Chickasaws by blood, and the land involved herein has at all times been restricted.

First cause of action of plaintiff's petition set forth the enrollment and degree of blood of plaintiff and the acquisition by plaintiff of the land by allotment patent, the land being part of her surplus allotment and a copy of the patent was attached (R. 1).

The basis of the claim of title of defendant (the tax deed) is set forth in the second cause of action of the petition (R. 2).

It was alleged that restrictions on alienation of this land by plaintiff have never been removed, and that there was allotted and patented to plaintiff as her homestead allotment, 100 acres of land in Section 14, Township 1 North, Range 6 East, and that there was allotted and patented to the plaintiff as her surplus allotment, or as land exclusive of homestead, 125 acres of land, including the 20-acre tract upon which defendant claims title by reason of said resale tax deed. The 125 acres of plaintiff's surplus allotment includes 20 acres in Section 14, Township 1 North, Range 6 East, and 80 acres in Section 23, Township 1 North, Range 6 East, five acres in Section 19, Township 3 North, Range 8 East, and the 20 acres involved in this suit, which is described as the South Half of Northwest Quarter of Northeast Quarter of Section 28, Township 2 North, Range 6 East (R. 2).

It was further alleged that on April 26, 1931, plaintiff was the owner of only 125 acres of her restricted allotted land, including the 100 acres which had been allotted to

her as a homestead and 25 acres of the land which had been allotted to her as her surplus allotment, including the 20 acres to which defendant asserts title by reason of the resale tax deed, and the five acres in Section 19, Township 3 North, Range 8 East, and that prior to then, 100 acres of her surplus allotment had been sold pursuant to an order for conditional removal of restrictions thereon (R. 3). That on April 26, 1931, and, thereafter, plaintiff had no restricted land other than the 125 acres of her allotted lands (including the 20 acres involved herein), which had not been sold prior to April 26, 1931, pursuant to order of the Secretary of the Interior, and she was entitled to have such restricted allotted lands which she still owned on April 26, 1931, remain exempt from taxation on and after April 26, 1931, as she did not then, or thereafter, own as much as 160 acres of restricted land, and further alleged:

> "That pursuant to the Act of Congress of May 10, 1928, by a tax exemption certificate dated May 28, 1929, which was approved by the Secretary of the Interior May 23, 1930, and was filed for record in the office of the County Clerk of Pontotoc County, Oklahoma, on the 26th day of June, 1930, and is recorded therein * * *, the following described land of the plaintiff's restricted allotted lands was designated to remain exempt from taxation on and after April 26, 1931, to-wit:
>
> "All of said homestead allotment above described contained 100 acres, and 60 acres of plaintiff's surplus allotment described as: * * *
>
> (20 acres in Section 14, and 40 acres in section 23, all in Township 1 North, Range 6 East) * * *

and a copy of said tax exemption certificate is hereto attached and marked Exhibit 'C' for the purpose of showing in connection with the other allegations of this petition that the land to which the defendant asserts title by reason of said purported resale tax deed was sold for taxes purportedly assessed against the same at a time when it was not subject to taxation.

"That after the execution, approval and filing of said tax exemption certificate and on the 1st day of November, 1930, the Secretary of the Interior made an order for the conditional removal of restrictions upon all of the surplus allotment of the plaintiff containing 125 acres; that said order for conditional removal of restrictions provided that it would become effective only and simultaneously with the execution of a deed by the plaintiff to a purchaser of said land after said land * * * was sold in compliance with the directions of the Secretary of the Interior and in this connection plaintiff states that said 20 acres of land upon which said purported resale tax deed was issued to the defendant has never been sold under said conditional order for removal of restrictions and the plaintiff is yet the owner thereof and it is restricted Indian land and not alienable by the plaintiff except upon sale under the directions of the Secretary of the interior pursuant to said conditional order for removal of restrictions, and plaintiff further states that pursuant to said conditional order for removal of restrictions 20 acres of the land allotted to the plaintiff as her surplus allotment described as: * * *

(20 acres in Section 14, Township 1 North, Range 6 East) * * *,

was sold to Chas. T. Bates and to make the sale effective plaintiff executed a deed to Chas. T. Bates for said 20 acres of land on January 10, 1931, and there

was endorsed on a copy of said conditional order for removal of restrictions a certificate showing the execution of said deed for said 20 acres of land sold thereunder to Chas. T. Bates, and a copy of said conditional order for removal of restrictions together with such certificate was filed for record in the office of the County Clerk of Pontotoc County, Oklahoma, on the 2nd day of February, 1931, and recorded * * *, and a copy thereof is hereto attached and marked Exhibit 'D' and made a part hereof, and said deed executed to said Chas. T. Bates for such 20 acres of land with a certificate thereon showing that said deed was executed and said land sold in compliance with the directions of the Secretary of the Interior pursuant to said conditional order removing restrictions was filed for record in the office of the County Clerk of Pontotoc County, Oklahoma, on the 2nd day of February, 1931, and recorded therein * * *, and a copy thereof is hereto attached and marked Exhibit 'E' and made a part hereof, and plaintiff further alleges that pursuant to said conditional order for removal of restrictions 80 acres of the land which was allotted to her as her surplus allotment and described as: * * *

(80 acres in Section 23, Township 1 North, Range 6 East) * * *

was sold in compliance with the directions of the Secretary of the Interior to P. A. Norris and to make the sale effective a deed from plaintiff to said P. A. Norris for said 80 acres of land was executed on March 13, 1931, and a copy of said conditional order for removal of restrictions, together with a certificate thereon showing the sale of said 80 acres of land to said P. A. Norris and the execution of said deed to him in compliance with the directions of the Secretary of the Interior was filed for record in the office of the County Clerk of Pontotoc County, Oklahoma, on the

BLEED THROUGH POOR COPY

6th day of April, 1931, and recorded therein * * *, and a copy of same is hereto attached and marked Exhibit 'F", and made a part hereof and said deed executed by the plaintiff to said P. A. Norris for said 80 acres of land with a certificate thereon by the proper official showing that the land conveyed thereby had been sold in compliance with the directions of the Secretary of the Interior pursuant to said conditional order removing restrictions was filed for record in the office of the County Clerk of Pontotoc County, Oklahoma, on the 6th day of April, 1931, and recorded * * *, and a copy of same is hereto attached and marked Exhibit 'G' and made a part of this petition.

"Plaintiff further states that after the execution of said deed to P. A. Norris for a part of the land included in said conditional order removing restrictions, plaintiff was the owner of only 125 acres of her restricted land, including her homestead allotment of 100 acres and 25 acres of her surplus allotment, including the 20 acres of land which is the subject of this suit, and that it was the duty of the Superintendent for the Five Civilized Tribes to file a tax exemption certificate showing that said 25 acres of land which had not been sold under said conditional order for removal of restrictions and described as: * * *

(The 20 acres in this suit and 5 acres in Section 19, Township 3 North, Range 8 East)
* * *

was to remain exempt from taxation on and after April 26, 1931, and plaintiff says that the same did remain exempt from taxation under the laws of the United States on and after April 26, 1931, until the 1st day of January, 1950, if it is not yet exempt from taxation."

The restrictions never have been removed on this land.

The conditional order for removal of restrictions, made by the Secretary of the Interior on November 1, 1930 (R. 10), stated:

> "Whereas, Winnie Colbert now Melville, a citizen of the Chickasaw Nation was allotted the following described land, to-wit: * * *
>
> (Description of the 125 acres allotted as surplus, including the 20 acres in this suit) * * *.
>
> "NOW, THEREFORE, I under the authority vested in me by the Act of Congress approved May 27, 1908 (35 Stat. 312) and the regulations prescribed thereunder, hereby remove the restrictions from said above described land, such removal of restrictions to become effective only and simultaneously with the execution of a deed by said allottee to the purchaser after said land has been sold in compliance with the directions of the Secretary of the Interior."

This conditional order for removal of restrictions did not effect a removal of restrictions on any land not sold thereunder in compliance with the directions of the Secretary of the Interior, and the 20-acre tract of land in this suit has never been sold thereunder, and remains restricted. *Powell* v. *City of Ada* (10th Cir), 61 F.2d 283; *Bailey* v. *Banister* (10th Cir.), 200 P.2d 683; *Coker* v. *Watson*, 123 Okla. 199, 252 Pac. 829; *Kelly* v. *Watkins*, 105 Okla. 116, 231 Pac. 873; *U. S. ex rel Sykes* v. *Lane, Secretary of the Interior* (Court of Appeals, D. C.), 258 Fed. 520.

## ARGUMENT

### First Proposition

**The Supreme Court of Oklahoma erred in holding that the land involved herein became taxable in 1930, or at any time prior to April 26, 1931, and in so holding the Supreme Court of Oklahoma overlooked the specific tax exemption in Section 19 of Act of Congress of April 26, 1906, 34 Stat. 144, and such decision of the Supreme Court of Oklahoma is in conflict with decisions of this Court in *Board of Commissioners of Creek County* v. *Seber*, 318 U.S. 705 and *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598.**

No restricted allotted lands of any allottee of any of the Five Civilized Tribes, including the Choctaws and Chickasaws, became taxable prior to April 26, 1931.

The plaintiff's patent to the land in this suit was signed by the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation in December, 1908, and was approved by the Secretary of the Interior and recorded in the Office of the Commissioner to the Five Civilized Tribes in 1909 (R. 21). The opinion of the Supreme Court of Oklahoma concluded that the patent was dated in 1908 within the meaning of the provision of the Atoka Agreement above quoted, and that 21 years from date of patent expired in 1929, and that therefore the land became taxable as of the first day of January, 1930, before Section 4 of the Act of May 10, 1928, *supra*, took effect on April 26, 1931, and that therefore the question was whether restricted but taxable Indian lands in Oklahoma could be sold for taxes.

This holding by the Supreme Court of Oklahoma is in conflict with numerous decisions of that court and of the Circuit Court of Appeals for the Tenth Circuit and is in conflict with decisions of this Court. Such decision of the Supreme Court of Oklahoma in this case overlooks the specific tax exemption contained in Section 19 of the Act of Congress of April 26, 1906, 34 Stat. 137, as follows:

> "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

By the opinion in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598, three cases were decided. Apparently case No. 624 involved the question whether 240 acres of restricted allotted lands of Nitey, full-blood Seminole Indian, Roll No. 1446, who died on October 17, 1930 (See *U. S.* v. *Oklahoma Tax Commission*, 131 F.2d 635, 636), was taxable at the time of her death. The opinion of this Court stated:

> "The deceased died before the Act of May 10, 1928, took effect, but her 240-acre holding was specifically exempt from direct taxation at the time of her death under Section 19 of the Act of April 26, 1906, and the transfer of lands, is therefore not taxable."

Each of the Seminole allottees had only a 40-acre homestead allotment, and only the homestead of the Seminoles was granted exemption from taxation by the Seminole Allotment Agreement. Such Seminole Agreement provided:

> "Each allottee shall designate one tract of 40 acres, which shall by the terms of the deed, be made in-

BLEED THROUGH POOR COPY

alienable and non-taxable as a homestead in perpetuity"—(30 Stat. 567).

So apparently the 240 acres of Nitey's allotment which she owned when she died in 1930, included 200 acres of surplus, or land exclusive of the 40-acre homestead, but all of her land was restricted under Section 1 of the Act of Congress of May 27, 1908, *supra*, and so although the treaty provision for tax exemption in that case related only to the homestead, all of the land was rendered non-taxable by the specific exemption by Federal law contained in Section 19 of the Act of April 26, 1906, *supra*. This subject is dealt with in Mills Oklahoma Indian Land Laws (published by Thomas Law Book Company in 1924) in paragraphs numbered 311 to 323, inclusive, and the author divides the subject into two subdivisions, to-wit: "Exemption by Treaty Stipulation" and "Exemption by Federal Law."

As to the Choctaws and Chickasaws the exemption by treaty stipulation terminated on the expiration of 21 years from the date of the patent, but the exemption by Federal law did not expire or terminate then.

The specific exemption by a Federal law contained in Section 19 of the Act of Congress of April 26, 1906, *supra*, refers only to restricted allotted lands while the title remains in the allottee. That includes this land in this case, but it has been held in numerous cases that no inherited lands of full-blood Indian heirs of allottees became taxable prior to April 26, 1931, as such inherited lands could not be conveyed by full-blood Indian heirs without the approval of the County Court of the county of the allottee's

residence under the first proviso of Section 9 of the Act of May 27, 1908, such lands being non-taxable for the reason that taxation by the state of any lands upon which federal restrictions upon alienation existed was inconsistent with the restrictions upon alienation imposed by Congress. This ground for declaring all restricted lands of the members of the Five Civilized Tribes in Oklahoma exempt from taxation by the state was recognized by this Court in *Board of Commissioners of Creek County* v. *Seber,* 318 U.S. 705, and in the opinion in that case it was said:

> "The obligation and power of the United States to protect and preserve those restricted allotted lands for the Indian owners has been recognized, *Heckman* v. *United States,* 224 U.S. 413, 56 L. Ed. 820, 32 S. Ct. 424, and they were held immune from State taxation as instrumentalities by which the United States provided for the welfare and education of its Indian wards. *United States* v. *Rickert,* 188 U.S. 432, 47 L. Ed. 532, 23 S. Ct. 478."

In Note 21 following that statement:

> "The land involved in the *Rickert* case was a trust allotment, rather than a restricted fee. The power of Congress of both types of allotments, however, is the same. See *United States* v. *Ramsey,* 271 U.S. 467, 471, 70 L. Ed. 1039, 1041, 46 S. Ct. 599."

The conditional order for removal of restrictions on this land provided that:

> "Such removal of restrictions to become effective only and simultaneously with the execution of a deed by said allottee to the purchaser after said land has been sold in compliance with the directions of the Secretary of the Interior" (R. 10).

The land involved herein has never been sold under such conditional order for removal of restrictions, and so, has at all times remained restricted. *Powell* v. *City of Ada, supra; Coker* v. *Watson, supra.*

In *Choate* v. *Trapp,* 224 U.S. 665, it was held that after restrictions upon certain lands of certain allottees of the Choctaws and Chickasaws were removed by Section 1 of the Act of May 27, 1908, *supra,* none of such allotted lands could be placed on the tax rolls before the expiration of 21 years from the date of the patent as long as the title remained in the original allottee, because of the tax exemption provision in the Atoka Agreement, *supra.* But the plaintiffs in that case who obtained that ruling were not Indians whose lands were restricted. The state could not tax any restricted allotted lands while the title remained in the allottees of any of the Five Civilized Tribes as long as such restrictions existed prior to April 26, 1931, because of the specific exemption by Federal law of such lands from state taxation contained in Section 19 of the Act of April 26, 1906, *supra.*

On this point the decision of the Supreme Court of Oklahoma in this case is in conflict with the following decisions:

—*Oklahoma Tax Commission* v. *United States,* 319 U.S. 598;

*Board of Com'rs of Creek County* v. *Seber,* 318 U.S. 705;

*United States* v. *Rickert,* 188 U.S. 432;

*Parker* v. *Richard,* 250 U.S. 233;

*Zweigel* v. *Webster,* 32 F. Supp. 1015;

*U. S.* v. *Shock* (CC), 187 Fed. 870;

*U. S.* v. *Bean*, 253 Fed. 1;

*United States* v. *Board of Com'rs of McIntosh County*, 154 F.2d 600;

*Board of Com'rs of Marshall County* v. *U. S.*, 152 F.2d 540;

*Powell* v. *City of Ada*, 61 F.2d 283;

*Marcy* v. *Board of Com'rs of Seminole County*, 45 Okla. 1, 144 Pac. 611;

*Watkins* v. *Howard*, 64 Okla. 166, 166 Pac. 706;

*McGeisey* v. *Board of Com'rs of Seminole County*, 45 Okla. 10, 144 Pac. 614;

*Combs* v. *Johnson*, 92 Okla. 189, 218 Pac. 1098;

*Johnson* v. *Jackson*, 156 Okla. 148, 9 P.2d 950;

*Squires* v. *Swanson*, 169 Okla. 390, 37 P.2d 276;

*Bridges* v. *Stick*, 106 F. Supp. 506,

and other cases.

**Second Proposition.**

**The Supreme Court of Oklahoma erred in holding that the land involved was taxable for the years 1939, 1940, and 1942, and at any time prior to two years after the Act of Congress of August 4, 1947, 61 Stat. 732.**

Section 4 of the Act of Congress of May 10, 1928, did not consent to the taxation of restricted land of any Indian, except land in excess of 160 acres. Under its terms, it did not become operative so as to cause any restricted allotted land to be subject to taxation before April 26, 1931. It was not intended by Section 4 of the Act of May 10, 1928, to

subject restricted land of any Indian to taxation where the Indian did not, on April 26, 1931, own more than 160 acres of restricted land. This case cannot be distinguished in principle from the cases of *Zweigel* v. *Webster,* 32 F. Supp. 1013, and *Board of Com'rs of Marshall County* v. *United States* (10th Cir.), 152 F.2d 540. What the Court of Appeals for the Tenth Circuit said in *United States* v. *Board of Com'rs of McIntosh County,* 154 F.2d 600, with reference to the widow of Sulloly Jones having "exhausted her right under the Act by designating as tax exempt other land aggregating 160 acres" was with reference to a designation which was completely operative and effective on April 26, 1931, when Section 4 of the Act of May 10, 1928, took effect. The plaintiff in this case is in the same position as were the children of Sulloly Jones in that case, and it was held as to them that the undivided interest of each of them in the land involved was exempt from taxation even though no tax exemption certificate was ever filed on such land. The case of *United States* v. *Hester,* 137 F.2d 145, which is referred to in the opinion of the Supreme Court of Oklahoma in this case has nothing to do with the case at bar. In that case an allottee owned more than 160 acres of restricted land and made a designation of 160 acres to remain exempt from taxation after April 26, 1931, and still owned all of such restricted land designated in such tax exemption certificate on April 26, 1931, and the land involved in that case was other land than that designated and it was put on the tax rolls for 1932 and later was sold for taxes and was taxable for 1932 and subsequent years. The status of the land had been fixed as of April 26, 1931, under the Act of May 10, 1928. In this case, the conditional

order for removal of restrictions was made more than two years after the Act of May 10, 1928, and after plaintiff had signed the tax exemption certificate which was filed, and after that, and before April 26, 1931, 60 acres of the land described in the tax exemption certificate was sold, so that the tax exemption certificate was abortive and ineffective as to 60 acres therein described, which 60 acres the plaintiff did not own on April 26, 1931, when the Act of May 10, 1928, took effect. Plaintiff did not have the right to herself make another tax exemption certificate after two years from May 10, 1928, but the duty to do so was with the Superintendent for the Five Civilized Tribes. Plaintiff owned only 125 acres of restricted land on April 26, 1931, including the land involved in this suit. So, under the terms of Section 4 of the Act of May 10, 1928, this land remained non-taxable after April 26, 1931. *Board of Com'rs of Marshall County* v. *U. S., supra.* The attempted distinctions of this case from *Zweigel* v. *Webster* and *Board of Com'rs of Marshall County* v. *U. S., supra,* attempted in the opinion of the Supreme Court of Oklahoma, in this case, are not sound. Actually, however, the only distinction attempted as to the *Marshall County* case by the opinion of the Supreme Court of Oklahoma in this case was based upon an erroneous application of Section 6(b) of the Act of Congress of August 4, 1947, in this case.

**Third Proposition.**

**The Opinion of the Supreme Court of Oklahoma is in error in construing Section 6(b) of the Act of Congress of August 4, 1947, as making the land herein involved taxable for the years 1939, 1940, and 1942, or as preventing plaintiff from contending that it was not taxable for those years.**

Section 6(b) of the Act of August 4, 1947, *supra,* recognizes that some restricted lands were still tax exempt, although not designated in any tax exemption certificate, and provides that the tax exemption on such lands will terminate at the end of two years from the date of the Act of August 4, 1947, unless a tax exemption certificate is filed as to such lands before the expiration of two years from August 4, 1947. There is absolutely nothing in Section 6(b) of the Act of August 4, 1947, which indicates an intent that it have retroactive effect so as to make land taxable for previous years when it was exempt, although no tax exemption certificate had been filed on it. The expression of opinion in *Bridges* v. *Stick* (D.C., E.D., Okla.), 106 F. Supp. 506, that the right of the Indian to claim that land upon which a tax exemption certificate had not been filed was tax exempt for years previous to August 4, 1947, terminated two years after August 4, 1947, is without support in the statute, and it is respectfully submitted that this Court should review the decision of the Supreme Court of Oklahoma in this case so that such erroneous decision of the United States District Court for the Eastern District of Oklahoma in that case, which was followed by the Supreme Court of Oklahoma in this case, may be corrected. There is nothing in the 1947 Act which indicates an intent to prevent any interested party from contending that any

land was not taxable for any previous year. Under the Act of August 4, 1947, this land may have become taxable for 1950, but not before then. Under the law of Oklahoma, no land is taxable for any year unless it has a taxable status on January First of such year. This was recognized by this Court in *Board of Com'rs of Creek County* v. *Seber, supra.* See the Oklahoma authorities for this proposition cited therein. On January First of each of the years 1939, 1940, and 1942, this land was exempt from taxation. *Board of Com'rs of Marshall County* v. *U. S., supra.*

Unless the intention clearly and strongly appears and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively, where to do otherwise would materially change existing rights. *Southwest Coal & Improvement Co.* v. *McBride*, 185 U.S. 499.

If the erroneous construction of Section 6(b) of the Act of August 4, 1947, which was expressed in *Bridges* v. *Stick*, and in the opinion of the Supreme Court of Oklahoma, in this case is allowed to stand, much confusion and ridiculous results will ensue. If this land had never been put on the tax rolls prior to 1950, it would now be the duty of the County Assessor to place it on the tax rolls for all years after 1931 (or even, 1930), under the opinion of the Supreme Court of Oklahoma in this case, by certificate of assessment of omitted property, provided for by statute in Oklahoma, and under this decision, the Indian would be estopped or precluded from claiming it was non-taxable for those years. In such case, if the land was sold by the Indian, upon sale approved by the Secretary of the In-

BLEED THROUGH POOR COPY

terior pursuant to the conditional order removing restrictions, would the purchaser be permitted to contend that the land was not taxable for the years prior to 1950, or is it only the Indian who cannot say that? There is nothing in the statute which purports to prevent any person from claiming that any land was not taxable for any year when it was not subject to taxation.

**Fourth Proposition.**

**The Supreme Court of Oklahoma erred in not holding that the resale tax deed issued to defendant was void and in not holding that the five years statute of limitation does not apply for the reason that the land was not "sold for *taxes*" within the meaning of Section 93, Title 12, O.S., 1951.**

The only change made in the third subdivision of Section 93 of Title 12, Okla. St., by the 1949 amendment was to change "two (2) years" to "five (5) years." This land was not "sold for taxes" within the meaning of such third subdivision as there were no taxes against it. *Hutchison* v. *Brown*, 66 Okla. 250, 167 Pac. 624; *Taylor* v. *Miles*, 5 Kan. 498, 7 Am. Rep. 558. The new subdivision 6 of Section 93 of Title 12, added by the 1949 amendment does not come into application as subdivision 3 does not fit the case. The purported tax charges or assessments could not exist against the land under the laws of the United States. The state taxing statutes provide for taxation of land subject to taxation, and sale of such land for non-payment of *taxes*, and of no other lands. The subject-matter is beyond the jurisdiction of the State Legislature—to provide for taxing land which is exempt from taxation under the laws of the United States, and for selling such land for purported taxes

which could not exist thereon. The mere recording of the tax deed in such case, where no tax existed, cannot start any statute of limitation. In such case the only possible applicable statute of limitation is that set forth in subdivision 4 of Section 93 of Title 12, O.S., 1951 (15 years), which depends for its application upon actual adverse possession for 15 years. *Morton* v. *Van Orsdol*, 203 Okla. 394, 222 P.2d 520. The argument made under this Fourth Proposition was not disputed by the majority opinion of the Supreme Court of Oklahoma in this case. It was, in effect, conceded. It appeared that the court considered that it was necessary to hold that the land was subject to taxation for the years for which taxes were assessed for which it was sold at the tax resale to the defendant, or that plaintiff is prevented by Section 6(b) of the Act of Congress of August 4, 1947, from claiming the land was not subject to taxation for those years, in order to affirm the judgment of the trial court in this case.

**Fifth Proposition.**

**The 1949 Amendment to the Oklahoma Statute of Limitation was not put in force as against plaintiff as to the land involved by Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239.**

Petitioner contends, under this proposition, that the holding of the United States Court of Appeals for the Tenth Circuit in *Wolfe* v. *Phillips*, 172 F.2d 481, was erroneous; that by the Act of April 12, 1926, Congress never gave its consent in advance for the State of Oklahoma to thereafter cut off causes of action by restricted Indians, or the United States for them, to recover restricted land, by short-

BLEED THROUGH POOR COPY

ening the time to bring suit on existing causes of action. In such case there has been no express waiver as to any specific statute of limitation by the United States for itself or its restricted Indian wards of the immunity from the defense of state statutes of limitation. *Board of Com'rs of Jackson County, Kansas,* v. *United States,* 308 U.S. 343. If the state statute of limitation, or any particular state statute of limitation, could not apply if the United States was prosecuting this action for the benefit of the restricted Indian ward, it could not apply against the Indian. *Patterson* v. *Carter,* 83 Okla. 70, 200 Pac. 855; *Tobley* v. *Dekinder,* 110 Okla. 63, 237 Pac. 67. We would more fully brief this proposition, if certiorari is granted in this case.

## REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

*First:* By its erroneous construction of Section 6(b) of the Act of Congress of August 4, 1947, the state court has decided a federal question of substance not heretofore determined by this Court, and has decided the question erroneously in a way probably not in accord with applicable decisions of this Court, as to construction of federal statutes.

*Second:* The Supreme Court of Oklahoma by its opinion in this case has decided federal questions of substance (as to when the land involved in this suit ever became taxable under the laws of the United States), in a way not in accord with, and in conflict with applicable decisions of this Court.

*Third:* Petitioner has been deprived by such decision of rights and immunities granted to her by Acts of Congress, the land involved having been specifically exempted by Acts of Congress from taxation by the state when the taxes involved were assessed against it.

## CONCLUSION

It is respectfully submitted that certiorari should be granted in this case to review the decision of the Supreme Court of Oklahoma, and that this Honorable Court should review such decision and reverse it.

Respectfully submitted,

JAMES W. BOUNDS,
Hugo, Oklahoma,
*Counsel for Petitioner.*

*Of Counsel:*

HAL WELCH,
Hugo, Oklahoma;

CARLOSS WADLINGTON,
Ada, Oklahoma.

April, 1955.

# APPENDIX

# APPENDIX

(Exhibit A)

IN THE DISTRICT COURT WITHIN AND FOR
PONTOTOC COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| WINNIE COLBERT, now BRIANS, *Plaintiff*, | ) | |
| vs. | ) | No. 20377 |
| C. W. ROODHOUSE, *Defendant.* | ) | |

JOURNAL ENTRY

Now on this 4th day of February, 1953, the same being a judicial day of the regular January, 1953, term of this Court, the above entitled cause comes on for hearing upon Motion for Judgment on the pleadings filed herein by the Defendant; the Plaintiff appearing by her Attorney, Carloss Wadlington, and the Defendant appearing by his Attorneys, Harrell & Trice, and presenting said Motion. The Court after due consideration of the pleadings on file herein and said Motion for Judgment and being fully advised in the premises finds that said Motion for Judgment on the Pleadings should be sustained and judgment entered herein for the Defendant.

IT IS, THEREFORE, BY THE COURT ORDERED that the Motion for Judgment on the pleadings filed herein by the Defendant be and the same is hereby sustained.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff take nothing by her action herein and that said action be and the same is hereby dismissed with prejudice to the commencement of another action upon the same cause and that the Defendant recover all his costs herein expended.

To all of which order and judgment of the Court the Plaintiff duly excepts and gives notice in open Court of her intention to appeal to the Supreme Court of the State of Oklahoma and said Plaintiff requests that said notice be entered on the trial docket of the Court; Thereupon, the Clerk of said Court is ordered to enter on the trial docket of the Court and in the proper records the notice of appeal to the Supreme Court and the same is entered forthwith.

(s) John Boyce McKeel
District Judge

OK AS TO FORM

(s) Carloss Wadlington
Attorney for plaintiff

(s) Harrell & Trice
Attorney for Defendant

Filed Feb. 7, 1953 and entered in Book 36 at Page 278.

ABE HOLLOWAY, Court Clerk, Pontotoc County. Okla.
By (s) W. D. Abbot, Deputy.

RECORDED Journal 68 At Page 67 (Page 43 of Transcript).

(Exhibit B)

FILED

In Supreme Court
of Oklahoma

NOV 9 - 1954

ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

| | | |
|---|---|---|
| WINNIE COLBERT, now BRIANS, *Plaintiff in Error,* | ) | |
| vs. | ) | No. 35,987 |
| C. W. ROODHOUSE, *Defendant in Error.* | ) | |

SYLLABUS

1. Indians residing in Oklahoma are "citizens" of the state, and are subject to assessment for ad valorem taxes under state laws, unless exempted by effective treaty provisions or Act of Congress.

2. Restricted, but taxable, Indian lands in Oklahoma could be sold by the state for delinquent ad valorem taxes as other lands in state. Act May 10, 1928, §§ 4, 5, 45 Stat. 496.

3. Where a member of the Chickasaw Tribe of Indians in Oklahoma was issued an allotment patent December 5, 1908, covering 100 acres as a homestead and 125 acres as surplus allotment, and thereafter, on May 28, 1929, designated 160 acres as land exempt from taxation, pursuant to Section 4 of the Act of Congress of May 10, 1928, 45 Stat. 495; and when on November 1, 1930, restriction on 125 acres of surplus land was removed by the Secretary of the Interior; whereupon, allottee sold 100 acres of surplus allotment, the re-

maining 20 acre tract of surplus allotment here involved was subject to the ad valorem taxes as other lands in the state.

4. Where after designating 160 acres of the allotment as tax-exempt and the removal of restrictions on surplus allotment allottee elected to sell part of her nontaxable lands, contention that it then became the duty of the Superintendent of the Five Civilized Tribes to file a supplemental designation declaring nontaxable lands which had previously become taxable under state law, and upon which allottee had waived her right of tax exemption, is not tenable under provisions of Section 4 of the Act of Congress of May 10, 1928, 45 Stat. 495 as amended by the Act of Congress of May 24, 1928, 45 Stat. 733.

5. Where the allottee failed to assert her claim to designate the land here involved as nontaxable, within the period of two years after the effective date of the Act of August 4, 1947, Subsection (b) of Section 6, Chapter 458, 61 Stat. 731, her right to tax exemption which accrued prior to the date of the Act is terminated. *Bridges* v. *Stick*, 106 F. Supp. 506.

6. Where land has been sold under state law for taxes and tax deed recorded and grantee under deed has gone into possession of the land and occupied the same for six years prior to filing suit by owner for recovery thereof, owner's cause of action is barred under Subsections 3 and 6 of Section 93, Title 12 O. S. 1951.

APPEAL FROM THE DISTRICT COURT OF
PONTOTOC COUNTY, OKLAHOMA
Hon. John Boyce McKeel, Judge

Action by Winnie Colbert, now Brians, as plaintiff, against C. W. Roodhouse as defendant, to recover land described as the South Half (S½) of the Northwest

BLEED THROUGH POOR COPY

Quarter (NW¼) of the Northeast Quarter (NE¼) of Section Twenty-eight (28), Township Two (2) North, Range Six (6) East, Pontotoc County, Oklahoma. From the judgment for the defendant, plaintiff appeals.

AFFIRMED

Carloss Wadlington,
Ada, Oklahoma, For Plaintiff in Error.

Harrell & Trice,
Ada, Oklahoma, For Defendant in Error.

O'NEAL., J.:

This appeal presents two questions of law: First, was the 20 acre tract of land here involved subject to taxation for the years 1939, 1940 and 1942; and second, if the land was taxable is plaintiff's cause of action barred by Subsections 3 and 6 of Sec. 93, Title 12 O. S. 1951? The court below answered both questions in the affirmative.

The present action was commenced on July 18, 1952, in the District Court of Pontotoc County, Oklahoma, by Winnie Colbert as plaintiff against C. W. Roodhouse as defendant, and the parties here retain the same positions and will be designated as plaintiff and defendant as in the trial court.

On December 5, 1908 plaintiff acquired by patent to the 20 acre tract described as the South Half (S½) of the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) of Section Twenty Eight (28), Township two (2) North, Range Six (6) East, Pontotoc County, Oklahoma, as a portion of an allotment of lands made to her as one of seven-eighths degree of Indian blood, theretofore enrolled as a citizen of the Chickasaw Nation enrolled opposite Roll Number 52 on the approved final roll of minor Chickasaws.

In her first cause of action plaintiff alleged that the defendant claimed some title and interest in the land described by reason of a resale tax deed dated May 12, 1943, issued by the County Treasurer of Pontotoc County, Oklahoma on said date to the defendant, and that said tax deed was recorded on May 12, 1943; that the resale of said land for taxes and the deed so issued is void as the land was exempt from taxation under the laws of the United States; that the defendant has been in the unlawful possession of said land for six years next preceding the filing of plaintiff's petition during which period defendant has occupied the land, taken the rents and profits and has excluded plaintiff from the possession thereof. Plaintiff's prayer is for possession of the land, a decree quieting title thereto, and for rents and profits.

Plaintiff's second cause of action is based upon the following allegations: That she was allotted 100 acres of land as her homestead, which allotment does not include the 20 acres here involved; that she was also allotted 125 acres of land as a surplus allotment; that the 20 acre tract of land here involved was included in her surplus allotment; that a tax exemption certificate covering 160 acres of her allotted lands was issued to her on May 28, 1929, which certificate was approved by the Secretary of Interior on May 23, 1930, and thereafter recorded in the office of the County Clerk of Pontotoc County, Oklahoma on June 26, 1930; this certificate, which designated lands exempt from taxation did not include the 20 acre tract here involved.

That after the approval of said tax exemption certificate by the Secretary of the Interior, and on November 1, 1930, the Secretary of the Interior entered his order removing restrictions on plaintiff's surplus allotment effective with date of plaintiff's deed in compliance with the directions of the Secretary; that plaintiff thereafter, and on January 10, 1931, sold 20 acres of her allotted land to Chas. T. Bates, and on March 13, 1931, plaintiff sold 80

BLEED THROUGH POOR COPY

acres of her allotted land to P. A. Norris, said sales being made with the Secretary's approval. These sales covered land in Sections 14 and 23, Township 1 North, Range 6 East, but did not include the 20 acre tract located in Section 28, in Township 2, here involved; that after the sales to Bates and Norris, plaintiff remained the owner of only 125 acres of her original allotment which 125 acres included the 20 acre tract involved in the present action. Upon these allegations the plaintiff contends that it became the duty of the Superintendent of the Five Civilized Tribes to file a supplemental exemption certificate substituting the 20 acres involved here for the tax-exempt lands theretofore sold.

Plaintiff also alleges that her failure to pay the tax on this 20 acre tract was occasioned by certain misinformation given by the County Treasurer of Pontotoc County, Oklahoma to the Superintendent of the Five Civilized Tribes as to the amount of taxes due on plaintiff's land for the years 1939 and 1940.

The answer of the defendant contains a general denial and a bar to the maintenance of the action based under the provisions of Title 12 O. S. 1951, § 93, Subsections 3 and 6.

After the filing of the suit, and on the 18th day of July, 1952, plaintiff caused a notice to be served upon the Superintendent of the Five Civilized Tribes advising him of the pendency of the present action. Under date of September 19, 1952, the United States of America by its authorized attorneys, the United States Attorney for the Eastern District of Oklahoma, filed election of the United States not to remove the cause to the Federal Court and filed a withdrawal of his former application for an extension of time within which to plead.

The defendant filed his motion for judgment on the pleadings and upon a hearing thereof the trial court entered

judgment sustaining the motion and entered judgment for the defendant. The appeal is by transcript and is therefore reviewable by this court. *Mires* v. *Hogan,* 79 Okl. 233, 192 P. 811.

The first question to be resolved is whether the 20 acre tract of land was taxable for the years 1939, 1940 and 1942 under state law. Under 30 Stat. 495, commonly referred to as the Curtis Act, the lands designated as surplus allotments were not taxable for twenty one years from the date of the patent. The applicable portion of the Act provides: "All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, * * *" (30 Stat. 495).

Plaintiff's allotment patent bears the signature of the Principal Chief of the Choctaw Nation under date of December 2, 1908, and the signature of the Governor of the Chickasaw Nation under date of December 5, 1908. *In re Lands of Five Civilized Tribes* (the 30,000 land suits) 199 Fed. 811, (D.C. E.D., Okl.) it was held that the date of patent referred to in Sec. 16 of the Choctaw-Chickasaw Supplemental Agreement July 1, 1902, c. 1362, 32 Stat. 643, from which the periods of restriction were to run, was the date when the patent was signed by the second of the two chief executives of the tribes. The land therefore became taxable for the year 1930. The resale tax deed here involved covered delinquent and unpaid taxes for the years 1939, 1940 and 1942. The question thus posed is, whether restricted but taxable Indian lands in Oklahoma can be sold by the State for delinquent and unpaid ad valorem taxes as other lands in the State.

Section 4 of the Act of May 10, 1928, 45 Stat. 495 and 496 provides in part:

> "* * * that on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian

of such Tribes in excess of 160 acres shall be subject to taxation by the state, in all respects as unrestricted and other lands. * * *"

Construing the foregoing Federal Statute the Circuit Court of Appeals, 10th Circuit, in *United States* v. *Hester*, 137 Fed. 2d 145, held:

"Indians residing in Oklahoma are 'citizens' of that state, and they are amenable to state's laws, and their property, unless exempt, is subject to taxation as property belonging to other citizens of that state.

"Restrictions against alienation of Indian lands, without more, do not render restricted lands immune from operation of state taxing laws.

"Restricted, but taxable, Indian lands in Oklahoma could be sold by state for delinquent ad valorem taxes as other lands in state." Act May 10, 1928, §§ 4, 5, 45 Stat. 496; 68 O. S. 1941, §§ 382, 432b.

The principle of law announced in the *Hester* case, *supra*, is restricted by the Circuit Court of Appeals, Tenth Circuit, in *United States* v. *Board of County Commissioners of McIntosh County, Okla., et al.*, 154 F.2d 600. It was there held:

"Where land of full-blooded Indian was restricted against alienation during his lifetime or prior to April 26, 1931, and Indian died in 1925 and land passed to his full-blooded wife and children, land was 'allotted land' within meaning of statute continuing to April 26, 1956 restrictions against alienation of land allotted to Indians, and land descended to Indian's full-blooded heirs subject to restrictions against alienation, and could not be taxed by Oklahoma so long as heirs did not own tax exempt land in excess of 160 acres." Act May 10, 1928, §§ 1, 2, 4, 45 Stat. 495, 496.

It is stated in the opinion that since the widow of Jones exhausted her right under the Act by designating as tax exempt other land aggregating 160 acres, her undivided interest in this land could not be selected for that purpose and therefore it became subject to taxation after April 26, 1931. But since none of the other heirs of Jones owned tax-exempt land in excess of 160 acres, including his or her undivided interest in this land, the undivided interests of such heirs in this land were exempt from taxation, even though no selection was made and no certificate of designation was executed and filed.

As we have seen as required by Section 4 of the Act of Congress of May 10, 1928, plaintiff, on May 28, 1929, designated lands in Sections 14 and 23 of Township 1 North, Range 6 East, Pontotoc County, Oklahoma consisting of 160 acres as tax-exempt as long as title remained in the allottee.

Plaintiff now claims that after she sold 100 acres of her tax-exempt land, after the removal of restrictions therefrom, to Bates and Norris in the year 1931, that it then became the duty of the Superintendent of the Five Civilized Tribes to file in her behalf a supplemental designation declaring nontaxable lands which had previously become taxable under the Act and on which she had waived her right of exemption.

As we understand plaintiff's argument she contends that notwithstanding she made the selection of 160 acres of land to be free from taxation as shown by her certificate of May 28, 1929, filed with the Department of the Interior, and which designation was approved by said Department, that her other nonexempt lands became exempt immediately after she sold a part of the 160 acres which she had originally designated as exempt land; that therefore the land here involved was exempt from taxation at all times, at least up to January 1, 1950.

To support this position plaintiff relies upon *Zweigel* v. *Webster*, (U.S. D.C. E.D. Okl.) 32 Fed. Supp. 1015, and *Board of Commissioners of Marshall County, Okl., et al.* v. *United States*, Circuit Court of Appeals, Tenth Circuit, 152 F.2d 540.

In the *Zweigel* case, *supra*, the Indian owners, the full-blood heirs of the allottee, never filed a designation of land to be tax-exempt as provided by Section 4 of the Act of May 10, 1928, 1-4, 45 Stat. 495, nor did the Superintendent of the Five Civilized Tribes file such a designation in their behalf. All that the *Zweigel* case decides is that the failure of the full-blood heirs of the allottee and the failure of the Superintendent of the Five Civilized Tribes to file a designation in their behalf does not deprive the land of its non-taxable character for the reason there is nothing in the Act of Congress which makes the lands taxable in the event of their failure to act. The cited case in our view does not decide the case presented by the record now before us for the simple reason that the allottee here did make a designation of 160 acres of her allotment as land exempt from taxes.

To resolve the question as to when the exempt land owned by the Indian of the Five Civilized Tribes loses its exempt character from taxation by failure to so designate it, or the failure or the neglect of the Superintendent to act, Congress deemed it expedient to enact Subsection (b) of Section 6, Act of August 4, 1947, Chapter 458, 61 Stat. 731, which Subsection of the Act provides:

> "All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period: Provided, That any right to tax exemption which accrued prior to the date of this Act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat.

777), shall terminate unless a certificate of tax exemption has been filed of record in the county where the land is located within two years from the date of this Act."

It is here conceded that the plaintiff did not file a certificate of tax exemption within the two year period of limitation from the effective date of the Act of August 4, 1947.

Plaintiff argues that her failure to make a further designation of nontaxable land does not bar her under the provisions of Section 6(b) of the Act of Congress of August 4, 1947, *supra*, for the reason that if she did not make such additional selection, that it was the duty of the Superintendent of the Five Civilized Tribes under the Act of May 10, 1928, and the Act of August 4, 1947, to make such a designation in her behalf.

In *Bridges* v. *Stick et al.*, 106 F. Supp. 506, the United States District Court E. D. Oklahoma, held:

> "Under 1947 federal statute, providing that rights accruing before date thereof to tax exemption of lands owned by Indians of Five Civilized Tribes under previous acts, requiring filing of tax exemption certificates merely for state's convenience and not as condition precedent to right of tax exemption, shall terminate unless such a certificate is filed of record in county wherein lands are located within two years after such date, land owned by such Indians ceased to be tax exempt on failure to file such a certificate within statutory time, so that they and United States were precluded from asserting claims to land as tax exempt in action by grantee to resale tax deed of land to quiet title thereto." Act May 10, 1928, 45 Stat. 495; Act Jan. 27, 1933, 47 Stat. 777; Act Aug. 4, 1947, § 61(b), 61 Stat. 751, 25 U.S.C.A. § 355 note.

So far as our search has led we have not found any decision of either a United States District Court or an Appellate Federal Court giving the Act of August 4, 1947, a contrary construction. We think the construction thus placed upon the Act comports with the intention of Congress to limit the time within which the restricted Indian may raise the question of the taxability of his restricted land. Any other construction would defeat the evident purpose of the amendment.

We are of the view that the *Board of County Commissioners of Marshall County, Okla., et al.* v. *United States, supra,* does not support plaintiff's contention that the 20 acre tract is not taxable.

In the *Marshall County* case, *supra,* the allottee owned 94.25 acres which he designated as his homestead. He also owned 10 acres as a surplus allotment. He filed his designation in 1929, covering the homestead land. Thereafter, in 1943, the Superintendent of the Five Civilized Tribes filed a designation for him covering the 10 acres of his surplus land. This 10 acre tract had been placed upon the taxable rolls and sold for nonpayment of the ad valorem state tax assessed against it. The United States made the contention that the 10 acre tract was not subject to the state tax because the allottee's homestead and surplus land only equalled 104.25 acres; whereas, the allottee under the Act of May 10, 1928, was entitled to have land equal to 160 acres tax-exempt, and that this right could not be denied the allottee by his failure or neglect to file the designation to preserve his right of tax-exempt on any part of his land. The court there said:

> "We think it is fair to conclude that Congress assumed such designations would be made, either by the Indians or the Superintendent, prior to April 26, 1931, but we do not think Congress intended that where the Indian failed to file a designation within two years from May 10, 1928, and the Superintendent failed to

file seasonably a designation for such Indian, consent should be regarded as given by Congress to tax restricted lands not in excess of 160 acres or that the Indian should lose his exemption."

The *Marshall County* case was decided prior to the Act of Congress of August 4, 1947, which limits the time to two years from and after August 4, 1947, within which the designation for tax exemption must be filed.

We conclude that under Section 4 of the Act of May 10, 1928, 45 Stat. 495, 496 that the allotted land of the plaintiff in excess of 160 acres was subject to the state ad valorem tax. When the plaintiff on May 28, 1929 made her selection of the 160 acres as nontaxable land, she thus obtained full benefit of the Act and exhausted her full right thereunder; therefore, the 20 acres involved in the present suit could not thereafter be selected as additional nontaxable land. Moreover, we hold that under the record in this case the plaintiff is barred from maintaining her action by reason of the enactment of Subsection (b) of Section 6 of the Act of August 4, 1947, Chapter 458, 61 Stat. 731.

The remaining question: Is the plaintiff's cause of action barred by Subsections 3 and 6 of Section 93, Title 12 O. S. 1951?

Under the last quoted statute plaintiff's action is barred by limitation unless the statute is inoperative by reason of the Acts of Congress, *supra*.

Plaintiff alleged that the defendant entered into possession of the 20 acre tract under a tax deed issued and recorded as of May 12, 1943, and that defendant's possession and occupancy continued for a period of six years prior to the filing of her petition. Plaintiff's action therefore is barred under the express provisions of the statute, *supra*. See *Woods* v. *Phillips Petroleum Co. et al.*, 207 Okl. 490, 251 P. 505, and *Williams* v. *Bailey* and *Sarkeys* v. *Scott*, not officially reported.

The judgment of the trial court is therefore affirmed.

HALLEY, C.J., JOHNSON, V.C.J., CORN and DAVISON, JJ. Concur.

WILLIAMS, J., Concurs in Part and Dissents in Part.

WELCH, ARNOLD and BLACKBIRD, JJ. Dissent.

(Exhibit C)

FILED
In Supreme Court
of Oklahoma
NOV 9 - 1954
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

| | | |
|---|---|---|
| WINNIE COLBERT, now BRIANS, *Plaintiff in Error,* | ) | |
| vs. | ) | No. 35,987 |
| C. W. ROODHOUSE, *Defendant in Error.* | ) | |

WILLIAMS, J., (specially concurring in part and dissenting in part).

I concur in the result reached in the majority opinion because plaintiff's petition shows on its face that it is barred by the statute of limitations, 12 O.S. 1951, 93. The trial court therefore properly sustained the demurrer to plaintiff's petition. In my opinion that is all that needs to be said in this case. The majority opinion, however, goes ahead to determine that the land in question became taxable for the year 1930 and was taxable for the years 1939, 1940 and 1942, and further, that plaintiff is barred from maintaining this action by reason of subsection (b) of section 6 of the Act of Congress of August 4, 1947, 61 Stat. 731. In my opinion these conclusions are not only unneces-

sary to the proper disposition of this case, but are completely erroneous.

The land in question was a part of the surplus allotment of plaintiff, Winnie Colbert, a 7/8ths blood Chickasaw Indian. The effective date of the allotment patent was December 5, 1908. Plaintiff's allotment was therefore not effective until after the effective date of the Act of Congress of May 27, 1908, 36 Stat. 312, which provided in pertinent part as follows:

> "That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restriction on alienation or incumbrance be as follows: * * * all allotted lands of enrolled full-bloods and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, * * *."

Since plaintiff is an enrolled, mixed blood of more than three-quarters Indian blood, the effect of this act was to make her entire allotment absolutely restricted and tax exempt until April 26, 1931. *Marcy* v. *Board of Com'rs of Seminole County*, 45 Okla. 1, 144 P. 611; *Board of Com'rs of Marshall County* v. *U. S.*, 152 F.2d 540; *United States* v. *Rickert*, 188 U. S. 432, 23 S. Ct. 478; *Zweigel* v. *Webster*, 32 F. Supp. 1015.

The first time that any restricted land was made taxable while at the same time remaining restricted was on April 26, 1931, by virtue of the provisions of the Act of Congress of May 10, 1928, 45 Stat. 495, which provides in pertinent part as follows:

> "That the restrictions against the alienation, lease, mortgage or other encumbrance of the lands allotted

BLEED THROUGH POOR COPY

to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931; * * *.

"4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands * * *."

Thus it may be seen that this act extended the restricted and tax exempt character of plaintiff's allotment to April 25, 1956, except that it removed the tax exemption from that portion of plaintiff's allotment in excess of 160 acres on April 26, 1931. The record reveals, however, that on April 26, 1931, plaintiff only owned 125 acres of restricted allotted land, including that portion of her allotment in controversy here. All of this land therefore remained tax exempt under the Act of Congress of May 10, 1928, *supra*, and could not have been subjected to taxation for the years 1939, 1940 and 1942 as held in the majority opinion. *Board of Com'rs of Marshall County* v. *U. S.*, *supra*. In that case the court said:

"Congress gave its consent to the state to tax restricted lands of Indians of the Five Civilized Tribes in excess of 160 acres. Where such an Indian owned only 160 acres or less or restricted land, Congress did not consent to the taxation of any part thereof."

I further dissent from the holding of the majority that the Act of Congress of August 4, 1947, 61 Stat. 732, bars plaintiff's action here. There is nothing in that act which in any way changes the tax-exempt character of the land in question for the years 1939, 1940 and 1942, even if such a thing could constitutionally be done, which I doubt. The

pertinent part of this act is section 6(b) thereof, which provides:

> "All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this act shall continue to be tax-exempt in the hands of such Indian during the restricted period; Provided, that any right to tax exemption which accrued prior to the date of this act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat. 777), shall terminate unless a certificate of tax exemption has been filed of record in the county where the land is located within two years from the date of this act."

Thus it may be seen this act specifically continued the tax-exempt character of plaintiff's allotment, but made the continuance of such tax-exemption past August 4, 1949, contingent upon the filing of a tax exemption certificate by that time. The act specifically says that such tax-exemption *shall terminate.* It does not say that the tax exemption of the land prior to that time shall be lost or changed in any way. Neither does it say anything which could be construed as a sort of statute of limitations on the right of plaintiff to contend that the land in question was tax exempt for years prior to the passage of the act. The only effect that this act had on plaintiff's allotment was to terminate the tax exemption thereof on August 4, 1949, because of plaintiff's failure to file a tax exemption certificate by that time. It has no bearing on the question of the taxability of the land in question for the years 1939, 1940 and 1942 at all.

I am of the opinion that the trial court's judgment was correct because plaintiff's petition shows on its face that defendant had been in the adverse possession of the property for more than five years, even though only claiming under a void tax deed, and plaintiff's cause of action is therefore barred by the statute of limitations. This is true

because section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239, specifically provides that the statutes of limitations of the State of Oklahoma are applicable to restricted Indians of the Five Civilized Tribes. To that extent I therefore concur in the majority opinion, but otherwise, I respectfully dissent.

(Exhibit D)

FILED

In Supreme Court
of Oklahoma

JAN 7 - 1955

ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA
January 7, 1955.

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

35,987—Winnie Colbert, now Brians, v. C. W. Roodhouse. Petition for rehearing denied.

HARRY L. S. HALLEY
Chief Justice. (R. 106)

[APPENDIX]

(Exhibit E)

FILED

In Supreme Court
of Oklahoma

FEB 1 - 1955

ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA
February 1, 1955

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

35,987—Winnie Colbert, now Brians, v. C. W. Roodhouse. Application for leave to file second petition for rehearing and motion for oral argument denied.

N. B. Johnson,
Chief Justice. (R. 107)